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No. 560

In the Supreme Court of the United States

OCTOBER TERM, 1947

EARLE W. HILTON, PETITIONER

v.

JOHN L. SULLIVAN, SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

MEMORANDUM IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION.

CHARLES FAHY,
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WALTER B. WILBUR,
Attorneys for Petitioner.

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Respondents' brief in opposition (pp. 15-18) disputes the necessity of considering the validity of sub-group A-1 Plus, established in the Civil Service Commission's reduction-in-force regulations (*Id.* p. 21). Petitioner's attack on the regulations is directed against both sub-group A-1 and A-1 Plus (Pet. Br. pp. 8-20), rather than chiefly addressed to the latter, as respondents contend. Nevertheless, respondents' argument on sub-group A-1 Plus calls for brief reply in the present posture of the

case in addition to the argument already presented on that issue (Pet. Br. pp. 8-12).

(a) The Solicitor General states that it is not deemed necessary to engage in extended discussion of the validity of the A-1 Plus category; that all employees therein are veterans and in any event are entitled to retention preference as against petitioner and other non-veterans. On the contrary, if sub-group A-1 Plus is held invalid, it cannot be assumed that the regulations in all other respects would be retained by the Commission as now written; and the Court will not take upon itself the discretionary authority vested in the first instance in the Commission. *Jacob Siegel* v. *Federal Trade Commission*, 327 U. S. 608, 613-614; *Holly Hill Fruit Products Co.* v. *Addison*, 322 U. S. 607, 619-623; *Securities Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 94-95; *Phelps-Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 197.

Apart from this, unless A-1 Plus is valid all employees therein, though veterans, are not entitled to preference over petitioner under the Veterans Preference Act of 1944, even as construed by respondents. Under respondents' own interpretation only those veterans whose efficiency ratings are "good" or better would go into sub-group A-1 and thus take precedence over all non-veterans, regardless of efficiency. Veterans with ratings below "good" would go into sub-group A-3, which has a lower place on the retention register than sub-group A-2, reserved for non-veterans with ratings of "good" or better (Resp. Br. pp. 3, 21-22).

The record shows that 61 veterans in sub-group A-1 Plus lacked the rating of "good" or better needed to place them in sub-group A-1 under present regulations. These 61 veterans are rated "no efficiency" (R. 28-29).

Non-veterans rated "no efficiency" are placed at the bottom of the retention register; that is, they are the first to go in reduction of force (R. 33).

Clearly, therefore, petitioner is aggrieved by the Commission's regulation establishing sub-group A-1 Plus, whereby at least these 61 men were placed above him on the retention register, without authority in law, for the statutory period of one year. As a result petitioner was reached on the register and furloughed in reduction of force while these men were retained (R. 23).

For the first time in this litigation respondents now offer an explanation of their action in this regard (Br. p. 15, footnote 10). They now contend that it was not deemed administratively necessary to give an efficiency rating, prior to the expiration of "their year of absolute preference", to persons classified as "Leadingman Shipfitter", who had demonstrated ability before they had been promoted to that classification. Respondents further contend, "there is nothing to show that they would not all have been given a "good" or better efficiency rating, based on past services, had it been necessary to do so at the time of their re-employment". This explanation is based on misconceptions of fact and of law. Petitioner and the 61 men with "no efficiency" ratings were all classified, not as "Leadingman Shipfitter", but as "shipfitter", and so appeared on the register for that class of employees (R. 26, 28-29, 31).[1] This is not a category of supervisory position and there is no factual basis whatever for assuming that all 61 would have received a rating of "good" or better. On the contrary,

[1] Petitioner had been a "Leadingman Shipfitter" at one time (R. 4), but had been demoted from that position to "Shipfitter" in a reduction of force under present regulations. *Id.* There are no employees with ratings of "no efficiency" on the register for "Leadingman Shipfitter" (R. 21-22).

since the case arises on the affirmance of a judgment granting respondents' motion for summary judgment, any genuine issues of fact material to this and other aspects of the case are to be resolved in favor of petitioner rather than respondents. *Sartor v. Arkansas Gas Corp.*, 321 U. S. 620, 627.

(b) Respondents (Br. p. 16) state that there is no necessity for considering the rationale of the decisions of this Court in *Fishgold* v. *Sullivan Drydock & Repair Co.*, 328 U. S. 275 and *Trailmobile Company* v. *Whirls*, 331 U. S. 40; that those cases dealt with Section 8 of the Selective Service Act, whereas the present case deals with the Veterans Preference Act of 1944. But it is clear that sub-group A-1 Plus is based, not upon the 1944 Act, but on the Commission's mistaken view of the requirements of Section 8 of the Selective Service Act (Pet. Br. pp. 8-9). The *Fishgold* and *Whirls* cases are therefore quite pertinent because their principles, like the Act they construed, apply equally to public and private employment.

(c) Respondents, while reiterating the position maintained since the regulations were established, that sub-group A-1 Plus was required by law, contend that the sub-group is now in force because the Commission "so desires" (Br. p. 18). This self-contradiction results from an attempt to rationalize the position in which the Commission now finds itself. The opinion of the court below upheld the regulations as if they had been an exercise of discretion, and denied that they were required by law; yet the fact is they were made by the Commission because of its belief that they were so required.

Applicable decisions of this Court preclude such attempted justification after the event. The administrative discretion vested in the Commission by Congress,

whatever its scope, has not been and cannot be exercised by a simple *volte face* in course of litigation. Issues involving the security and livelihood of hundreds of thousands of Federal employees, veteran and non-veteran, should not be so resolved, leaving unused the function of administrative determination.

It is submitted that the corrective powers of this Court may not be so casually avoided, and that this Court will confine itself, as the court below should have done, to the validity of the ground on which the Commission believed itself required to rest its action. See *Securities & Exchange Commission* v. *Chenery,* 318 U. S. 80, 88, 94-95; *cf. United States* v. *Carolina Carriers Corp.,* 315 U. S. 475, 488-489; *Mabee* v. *White Plains Publishing Co.,* 327 U. S. 178, 184-185. If, as petitioner contends and the court below held, sub-group A-1 Plus is not required by law, the regulations prescribing that category should be set aside, regardless of whether they might be sustained, after remand and reconsideration, as the product of the exercise of permissible discretion, a question which might never be posed. It is submitted that only in this manner can the dead timber of regulations founded on error be removed, the responsible exercise of administrative authority be given vitality, and the orderly functioning of the process of review in an important matter be fulfilled.

Respectfully submitted,

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March, 1948.